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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-195132

DATE: August 6, 1981

MATTER OF: Gerald V. Mann - Backpay - Higher Grade
Positions in Other Regions - Equal Pay
for Equal Work

DIGEST:

Although classified GS-15 position did not exist in HEW Region X, a GS-14 employee claims backpay under Turner-Caldwell and the principle of equal pay for equal work, contending his duties were: (1) the same as those classified in GS-15 in other regions; (2) subsequently classified as GS-15 in Region X; and (3) covered by a standard GS-15 position used in other regions which would have been established in Region X but for wrongful refusal of Regional Personnel Officer. The claim must be denied under Turner-Caldwell because the employee was not detailed to a position classified in higher-grade, and under United States v. Testan which holds there is no entitlement to backpay for a period of claimed wrongful classification.

Mr. Gerald V. Mann, an employee of the Department of Health Education and Welfare (HEW) - now the Department of Health and Human Services - appeals the denial of his claim for retroactive temporary promotion and backpay by our Claims Division on March 15, 1979. For the reasons discussed hereinafter, we affirm the disallowance.

Mr. Mann has predicated his claim on Turner-Caldwell, 55 Comp. Gen. 539 (1975), affirmed, 56 Comp. Gen. 427 (1977), which holds that if an employee is detailed to a position classified in a higher grade for a period in excess of 120 days without Civil Service Commission approval, he or she is entitled to a retroactive temporary promotion and backpay for that period, provided the employee would have met all the qualifications and other requirements for such a promotion. However, the principal contentions made by Mr. Mann involve classification issues which were addressed by the United States Supreme Court in United States v. Testan, 424 U.S. 392 (1976). That case holds that there is no entitlement to backpay for a period of claimed wrongful classification and that a Federal employee is entitled to receive only the salary of the position to which he is appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade.

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Mr. Mann was assigned to the position of Regional Vocational Rehabilitation Program Specialist GS-101-14, Position No. RO-182, at HEW's Region X in Seattle, Washington. He contends that from April 20, 1973, to September 13, 1976, he performed the duties of a position which was ultimately classified as Rehabilitation Services Program Director, GS-101-15, Position No. X7175s (Director, Office of Rehabilitation Services).

Throughout the period of his claim the official class title, series, and grade of Mr. Mann's assigned grade GS-14 position remained unchanged. However, as a result of the enactment or amendment of legislation and organizational changes, his position description was amended and his organizational title or designation was changed several times. On April 20, 1973, the beginning date of his claim, he was designated Chief Program Representative for Rehabilitation Services for Region X; on December 28, 1973, Regional Rehabilitation Representative for the Rehabilitation Services Administration; and on February 2, 1975, Acting Director of the Office of Rehabilitation Services.

The record indicates that the grade GS-15 position to which the detail is alleged was not classified until the latter part of 1977, and that no classified position in grade GS-15 encompassing the duties Mr. Mann performed existed in Region X during the period covered by his claim. The major reason for this appears to have been a considerable question as to the proper grade for these duties. The Civil Service Commission (CSC) - now the Office of Personnel Management (OPM) - which has final authority over position classification under 5 U.S.C. §§ 5101 et seq., notified Region X by letter dated April 7, 1976, that the proper grade was GS-14. It was not until more than a year and a half later that the CSC finally approved the grade GS-15 classification on December 16, 1977, and then only after Region X had resubmitted the position with proposed changes. These involved an increase from grade GS-12 to GS-13 in the base level of the work supervised, a major factor in the classification of supervisory positions.

Mr. Mann does not seriously contend that a position classified in grade GS-15 encompassing the duties he performed existed in Region X during the period of his claim. What he does contend, as we understand it, is that he is entitled to backpay because:

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(1) the CSC ultimately approved the classification of the position in grade GS-15 and since there had been no significant changes in the duties during and after the period of his claimed detail it was a grade GS-15 position during that time;

(2) positions in other regions with organization titles or designations and duties virtually identical to his were classified in grade GS-15 at the time in question and the law provides for equal pay for equal work; and

(3) a standard grade GS-15 position used in some of the other regions could have been established in Region X. In fact, a vacancy had been announced in May 1975, for this position in Region X and in two other regions but was withdrawn for Region X because the Regional Personnel Officer there refused to certify the position in grade GS-15. This he had no right to do because authority to classify this position had been retained by a higher echelon, Headquarters, Office of Human Development.

Viewing Mr. Mann's claim as one based on an alleged detail to a higher-grade position, we hold that he is not entitled to a retroactive temporary promotion and backpay under Turner-Caldwell. This decision and those that implement it, as well as Federal Personnel Manual Bulletin No. 300-40, leave no doubt that an essential requirement for such entitlement is that the detail must be to a position which has been classified as to title, series, and grade by a duly authorized agency official or by CSC/OPM. Herbert J. Buteau, B-187287, May 13, 1977. The existence of classified positions in other regions with the same titles or designations and with the same duties does not satisfy this requirement. Jerry C. Oosting, B-190308, November 2, 1978; Donald P. Konrady, B-193555, January 26, 1979.

Moreover, the record indicates that, notwithstanding the issuance of the vacancy announcement, the standard grade GS-15 position used in some other regions was never authorized for Region X, and properly so, it would appear, in view of the aforementioned determinations made by CSC regarding the Region X position. (In this connection we note that this standard position was evaluated at grade GS-14 by the CSC in one of the regions where it was being used, Region VI, in the latter part of 1975 or the early part of 1976.) Therefore, since there was no classified position in grade GS-15 in Region X encompassing the duties Mr. Mann performed during the period covered by his claim, his claim must fail under Turner-Caldwell.

The other view of Mr. Mann's claim is that it is one based on classification issues. This invokes the principle of equal pay for equal work and the proposition that during the period in question his grade GS-14 position was improperly classified because the duties he performed were: (1) the same as those in other regions classified in GS-15; and (2) were subsequently classified in grade GS-15 without significant change in Region X. The claim must also fail when reviewed in this manner.

Essentially what Mr. Mann is contending is that the GS-15 classification effected in late 1977 should be made retroactive to the beginning of the period of his claim, April 20, 1973. His contentions are substantially the same as those of the respondents in Testan. They unsuccessfully argued for the retroactive reclassification of their positions and backpay on the principle of equal pay for equal work, contending that their positions were the same as those in another agency which were classified in a higher-grade. In rejecting these arguments, the Supreme Court took note of the fact that in the "purpose" section of the Classification Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was "to provide a plan for the classification of positions whereby * * * the principle of equal pay for substantially equal work will be followed." However, the Court went on to say that no place in the Act was there an express provision for the award or backpay to a person who has been erroneously classified. The Court concluded that the "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification" and that "neither the classification Act (5 U.S.C. § 5101 et seq.) nor the Back Pay Act (5 U.S.C. § 5596) creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications."

Decisions of this Office and regulations of the CSC/OPM are consistent with the Court's holding and, with one limited exception not here applicable, specifically prohibit retroactive classification actions. 55 Comp. Gen. 515 (1975); Joseph J. Zarba, B-198473, May 4, 1981; 5 C.F.R. 511.701-511.703 (1980). Thus, even if Mr. Mann's position were improperly classified during the period of his claim, which the record refutes, he could not be awarded backpay.

One last point should be added concerning Mr. Mann's contention that his position was the same as those classified in a higher-grade in other regions. The governing statute,

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5 U.S.C. § 5107, requires that positions be classified in conformance with or consistently with standards published by the CSC/OPM and not by comparison with other positions. See Jerry C. Oosting, B-190308, November 2, 1978.

In view of the foregoing our Claims Group disallowance of Mr. Mann's claim must be sustained.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States